SKE-UNI (D)

No. 965

In the Supreme Court of the United States

October Term, 1943.

SKELLY OIL COMPANY, *Petitioner,*

vs.

MADIE RAY AMACKER, INDIVIDUALLY AND AS GUARDIAN OF BARBARA ANN AMACKER, *ET AL.,* **MINORS,** *Respondents.*

Petition for Writ of Certiorari, and Brief in Support Thereof.

W. P. Z. GERMAN,
ALVIN F. MOLONY,
P. O. Box 1650,
Tulsa 2, Oklahoma,
Counsel for Petitioner.

Of Counsel:
ED M. WHITAKER,
ROBERT M. TURPIN,
Midland, Texas.

INDEX.

TABLE OF CASES.

STATUTES.

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MADIE RAY AMACKER, INDIVIDUALLY AND AS GUARDIAN OF BARBARA ANN AMACKER, *ET AL.*, MINORS, *Respondents.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Skelly Oil Company, respectfully prays for the issuance of a writ of *certiorari* to the Circuit Court of Appeals for the Fifth Circuit to review the judgment of that court entered on December 16, 1943 (R. 497), pursuant to a majority opinion of the court (R. 490-493, 140 F. (2d) 21), motion of respondents for a rehearing (R. 498-511) denied February 7, 1944 (R. 512), in a case numbered and entitled on its docket "No. 10772, Skelly Oil Company, appellant, *vs.* Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, *et al.*, minors, appellees." Thereby said court reversed a judgment (R. 443) of the United

States District Court for the Western District of Texas in favor of the respondents (plaintiffs in the District Court), and directed a new trial of the case, instead, as petitioner urged, of directing a judgment for petitioner or itself rendering such judgment.

A certified transcript of the record in the case, including the proceedings in the said Circuit Court of Appeals, is presented herewith in accordance with Rule 38 of this Court.

Summary Statement of Matter Involved.

Respondents, Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, Sandra Ray Amacker and Elmer O'Neal Amacker, Jr., minors, they being the widow and three minor children of Elmer O'Neal Amacker, deceased, residents and citizens of the State of Texas, sued petitioner, Skelly Oil Company, a Delaware corporation, to recover $132,000.00 as damages alleged to be due them by reason of alleged acts of negligence of petitioner, alleged to have resulted in the injury of Elmer O'Neal Amacker while he was performing physical labor in cleaning sediment out of an oil stock tank on an oil and gas lease of petitioner on land located in Andrews County, Texas, from which injury Amacker was alleged to have died. (R. 1-9)

The case was twice tried; the first trial resulted in a judgment for petitioner, based on a directed verdict in its favor, which was reversed on appeal and a new trial ordered (132 F. (2d) 431); and on the second trial a verdict and judgment were rendered for respondents and on appeal (the second appeal) this was reversed and another trial ordered, as stated above, one judge dissenting, his view being that petitioner's motion for a directed verdict should have been sustained. (R. 493-496, 140 F. (2d) 23)

In their First Amended Original Petition (R. 2 to 9), filed after the first reversal, respondents alleged (R. 3) that Elmer O'Neal Amacker was an invitee of petitioner due to the fact he was working as an employee of Gibbins and Heasley, Inc., who in turn was performing work for petitioner in cleaning out a tank containing poisonous gas and fumes; but, they also alleged that petitioner "had full charge and control" of Amacker. They alleged that petitioner was guilty of certain acts of negligence in failing to do certain things, among them a failure to provide Amacker with a gas mask (R. 4) and in not steaming out the tank in advance of the cleaning work (R. 4-5). In paragraph V of the amended petition respondents specially alleged that the work which was contracted by petitioner to Gibbins and Heasley, Inc., was of such an exceptional and highly hazardous danger that petitioner was estopped to deny liability by alleging the independence of Gibbins and Heasley, Inc., Amacker's employer.

Petitioner filed its first amended answer (R. 9-13) in which, among various defenses, it denied each and all the alleged acts of negligence and also denied that Amacker was its invitee (R. 10). Specially answering the estopped allegation based on the inherently dangerous allegation in paragraph V of the amended petition (and solely for an answer to that allegation), the petitioner (par. "e" of its answer, R. 10-11) admitted the alleged independence of Gibbins and Heasley, Inc., and pleaded such independence, that Amacker was the employee of the contractor and working under the contractor's control and denied the other allegations of said paragraph. Petitioner also set forth certain special defenses (R. 11-12) including its "Fifth Defense" reading:

"This defendant alleges that the plaintiffs herein

are not entitled to recover actual damages, if any, against it for the reason that it was a subscriber under the Workmen's Compensation Law of Texas at the time of the alleged accident."

On these amended pleadings the second trial was had. Thereat the testimony *of the respondents* (which showed that Amacker became ill while engaged, with another worker, on the second day in the tank cleaning work and later on died), in so far as it related to the legal relationship between Amacker (and his co-worker) and the petitioner, so petitioner contended at the second trial and on the second appeal, was undisputed to the effect that Amacker, while a general employee of Gibbins and Heasley, Inc., was (as was also his co-worker) on the occasion in question a special employee of petitioner, that is, it showed that petitioner had the "right of control" of Amacker,* and that testimony was supplemented by testimony introduced by petitioner to the same effect. All the testimony in the record relating to that question is copied, with the record references, in Appendix "A" attached to this petition and the supporting brief and same is made a part hereof. Petitioner also proved (R. 196-220), and respondents, while at first objecting (R. 191), later (by Mr. Russell, one of respondents' counsel) admitted (R. 249-250), that petitioner was a subscriber under said compensation law and carried compensation insurance, whereupon the proof thereof was admitted in evidence without objection (R. 250).

In its original answer, on which, with the respondents' original petition, the case was tried the first time, the petitioner did not plead that it was a subscriber under the compensation law of Texas. At that trial, as the majority opin-

*Under the Texas decisions, as shown in the brief which follows, one who has the right of control of a workman is his employer.

ion on the second appeal discloses (see, second paragraph of *per curiam* opinion, R. 491, 140 F. (2d) 22), the respondents, as plaintiffs, claimed the independence of Gibbins and Heasley, Inc., that Amacker was that company's employee and that he was an invitee of petitioner, and the petitioner, as defendant, proceeded on the theory that Amacker was its invitee as alleged by respondents. At that trial the District Court held that petitioner had breached no duty it owed to Amacker, and directed a verdict and entered a judgment for petitioner. (See, 132 F. (2d) 432.)

But, the fact that respondents so contended or proceeded at the first trial does not appear from the opinion on the first appeal (132 F. (2d) 431), although it does therein appear that petitioner did so. As previously stated, and as the opinion on the second appeal discloses, after the first reversal and before the second trial, petitioner not only denied that Amacker was its invitee, but also pleaded its aforesaid Fifth Defense. After the verdict against it, petitioner (merely as a precaution), with leave of the court (R. 16), filed its Eighth Defense (R. 14), readings as follows:

> "Defendant further alleges that according to the undisputed evidence in this case the deceased, Elmer O'Neal Amacker, was at the time of the alleged accident complained of a special employee of this defendant and was working under the direction and control of this defendant in the performance of the tank cleaning work which this defendant was doing at the time of said alleged accident and that at said time this defendant was a subscriber under the Workmen's Compensation Law of Texas and, because of said facts, the plaintiffs are not entitled to any relief sought in this action."

This was done under the provisions of Rule 15 (b) of the Rules of Civil Procedure.

On the first appeal the Court of Appeals held in substance and effect that under the testimony the deceased Amacker was a special employee of petitioner, not petitioner's invitee, and petitioner contended and still contends that it was solely by reason of that holding that the court then held that the case should have been submitted to the jury and reversed the judgment in favor of petitioner and directed a new trial. In its opinion (on the first appeal) the court said:

> "It was in testimony too that deceased had worked as a roustabout for many years in oil fields, that Gibbins & Heasley, Inc., his employer who had sent him to the defendant to do this job of cleaning out the tanks was in the business of furnishing men to oil companies for work as called for, *and that it either sent them, as it did this time, without a foreman and without tools,* or with a foreman and with tools, according to request. *That on this occasion it was merely called upon to send two men without a foreman and without tools, that the defendant was to direct when and how they were to do the work and provide them with the necessary tools to do it.*"*

Therein it also said:

> "*On this record, the defendant had supervision and control over deceased* and was under a duty to exercise due care to see that the dangerous work *it put him to doing* was done by reasonably safe and prudent means and methods, and deceased in going into the tank to do the work required *with the tools and equipment and in the way provided by the defendant* * * *," etc.

At the conclusion of the evidence at the second trial, the testimony again showing that Amacker was its em-

*Italics supplied unless otherwise indicated.

ployee, and petitioner having this time pleaded and proved it was under the compensation law, petitioner filed a motion (R. 16-19) for a directed verdict in its favor. Two grounds, IX and X (R. 18-19) of said motion were in substance, *first*, that the Court of Appeals had held on first appeal that Amacker was petitioner's employee and that such became the law of the case as the testimony at the second trial was substantially the same on that question as on the first trial, and petitioner was this time shown to have been a subscriber under the compensation law, and, *second*, because the undisputed evidence showed that Amacker was the employee of petitioner, that the respondents had alleged that petitioner "had full charge and control" of him in the tank cleaning work, and that petitioner was a subscriber under the Workmen's Compensation Law.

Said compensation law prohibits the maintenance of an action for actual damages* in a case of this character. The Workmen's Compensation Act of Texas, in Section 1 of Article 8309, Vernon's Civil Statutes of the State of Texas, defines an "Employee" as follows:

> "'Employee' shall mean every person in the service of another under any contract of hire expressed or implied, oral or written, * * *."

Section 3 of Article 8306 of said act provides:

> "*Sec. 3.* The employees of a subscriber and the parents of minor employees shall have no right of action against their employer or against any agent, servant or employee of said employer for damages for personal injuries, and the representatives and beneficiaries of deceased employees shall have no right of

*Exemplary damages, not sought in this action, are recoverable only in extreme cases. Section 5 of Article 8306; *Bennett* v. *Howard*, (Tex. Sup.) 170 S. W. (2d) 709.

action against such subscribing employer or his agent, servant or employee for damages for injuries resulting in death, but such employees and their representatives and beneficiaries shall look for compensation solely to the association, as the same is hereinafter provided for."

Compensation under said statute is recoverable only by proceedings instituted before the Industrial Accident Board of the State of Texas, and the courts are without jurisdiction, except on appeal from a final order of said Board, of a claim for compensation. Sec. 5 of Article 8307; *Mangus* v. *Wadley*, (Tex. Sup. Ct.) 285 S. W. 1084; *American Surety Co.* v. *Mays*, (Tex. Civ. App.) 157 S. W. (2d) 444; *Hart* v. *Gulf Casualty Co.*, (Tex. Civ. App.) 170 S. W. (2d) 491. Respondents have never yet sought to recover compensation from petitioner. Therefore the reversal in this case could not have been to give the respondents an opportunity to recover compensation in this action.

The District Court denied petitioner's said motion (R. 422), and submitted the case to the jury on instructions (R. 427-440), including an instruction (R. 435) that as a matter of law under the evidence Amacker was an invitee on the premises of the petitioner.

The District Court expressed the view (R. 419) that no case had been made out by respondents, but ruled that the motion of petitioner for an instructed verdict should be denied because it felt (R. 419-422) that it was bound to submit the case to the jury under the opinion (on the first appeal) of the Court of Appeals. The District Court, in commenting on the defense of no liability for damages as at common law, among other things said (R. 420):

"As the court says, the court is disposed to let the

Circuit Court of Appeals take the burden of this question as well as of the case as a whole, * * *"

The jury returned a verdict against petitioner (R. 442), on which a judgment was entered (R. 443).

Petitioner thereupon filed a motion for judgment in its favor notwithstanding the verdict or, in the alternative, for a new trial (R. 444). The 8th and 9th grounds (R. 446) of the former were the same as petitioner's grounds for a directed verdict. Said motion was denied (R. 461-462).

On June 28, 1943, the District Court approved petitioner's bill of exceptions (R. 467-470), which included Exceptions IX and X (R. 468-469), which stated the same points and contentions of petitioner that were set forth in its motion for a directed verdict. On July 17, 1943, petitioner filed its notice of appeal (R. 463). The points to be relied on (R. 473-474) included those set forth in petitioner's motion for a directed verdict. The first and principal specification of error relied on by petitioner, and set forth in its brief on the appeal, was stated as follows:

"The trial court erred in denying defendant's motion for a directed verdict because:

"*(a)* The undisputed evidence establishes that the decedent Amacker, while in the general employ of Gibbins & Heasley, Inc., was a special employee of Skelly Oil Company. It shows that he was such under both the law of master and servant and the Workmen's Compensation Act of Texas as said act has been interpreted and applied by the courts of Texas. It also shows that defendant was a subscriber under the Workmen's Compensation Act of Texas. Hence, no right of action existed for actual damages for injuries resulting in Amacker's death.

"*(b)* This Court, in its opinion (132 F. (2d) 431) on the first appeal of this case (No. 10373), clearly

adopted the view that the evidence at the first trial established that Amacker was defendant's special employee. On that question the evidence at the second trial was substantially the same as at the first, but this time it also showed that defendant was a subscriber under the compensation law.

"The remaining specifications are subsidiary to number I, which we feel is controlling and decisive."

After briefs were filed by both parties the case was orally argued in the Court of Appeals on November 15, 1943 (R. 489). In the majority (the *per curiam)* opinion (R. 490-493, 140 F. (2d) 21) the court failed to mention or to discuss the petitioner's said specification of error. It held that the District Court erred in peremptorily charging the jury that the deceased was an invitee upon the premises of petitioner, and also erred in refusing to give petitioner's Requested Instruction No. 1 (R. 424-425, made after the denial of petitioner's motion for a directed verdict) to the effect that if the deceased were a special employee and was under the supervision and control of the defendant (petitioner here), the verdict should be for the defendant. In the latter connection the *per curiam* opinion stated:

"There was substantial evidence to the effect that the deceased was doing work for the defendant and that the defendant not only had the right to supervise and control him in his work, but actually exercised that right."

But, the court did not state that there was any evidence to the contrary; it simply held that the evidence to which it referred (in the quotation just made), presented an issue that should have been submitted to the jury.

Judge WALLER, in a dissenting opinion (R. 493-496, 140 F. (2d) 23-24), held that there was no dispute in the evi-

dence that the defendant had the *right* to the supervision, direction, and control of the deceased, and that under the Workmen's Compensation Statute of Texas and decisions of the State of Texas, and under the well-known borrowed servant rule, Amacker became and was the special employee of the petitioner and therefore the right of recovery is measured exclusively by said statute. He also said that in its first opinion the court had held that Amacker was under the supervision and control of petitioner. He concluded by stating that in his view the motion of the petitioner for a directed verdict should have been sustained.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240 (a) of the judicial code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

(2) The judgment of the Court of Appeals was rendered in a civil action.

(3) The date of the judgment to be reviewed is December 16, 1943. Petition for rehearing filed by respondents was denied February 7, 1944.

(4) It is believed that the following cases sustain the jurisdiction of this Court:

West v. *American T. & T. Co.*, 311 U. S. 223, 85 L. ed. 139;

Story Parchment Company v. *Patterson Parchment Paper Company, et al.*, 282 U. S. 555, 75 L. ed. 544;

Galloway v. *United States*, 319 U. S. 372, 87 L. ed. 1458;

Cities Service Oil Company v. *B. P. Dunlap, et al.*, 308 U. S. 208, 84 L. ed. 196;

Griffin v. *McCoach*, 313 U. S. 498, 85 L. ed. 1481.

Question Presented.

The following question is presented:

Whether, as contended by petitioner, the Court of Appeals erred in failing to hold that the evidence was undisputed to the effect that the deceased Amacker was a special employee of petitioner at the time he was performing the work in cleaning the petitioner's oil stock tank, and, since petitioner was a subscriber under the Workmen's Compensation Law of Texas, in failing to hold that petitioner's motion for a directed verdict should have been sustained, and erred in failing to reverse the cause and to render judgment therein for petitioner, instead of reversing and remanding the cause for a new trial.

Reasons Relied Upon for the Allowance of the Writ.

The discretionary power of this Court is invoked upon the following grounds:

(a) The Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law in a way clearly in conflict with a local statute and decisions, namely, the Workmen's Compensation Law of Texas and such Texas cases as the following:

Maryland Casualty Co. v. *Donnelly,* (Civ. App. Tex.) 50 S. W. (2d) 388;

Western Casualty & Surety Co. v. *Mueller,* (Civ. App. Tex.) 169 S. W. (2d) 223;

Magnolia Petroleum Co. v. *Francis,* (Civ. App. Tex.) 169 S. W. (2d) 286;

Shannon v. *Western Indemnity Co.,* (Tex. Com. App.) 257 S. W. 522;

Judson & Little v. *Tucker,* (Civ. App. Tex.) 156 S. W. 225.

(b) The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's discretion to review its action. Said court, by its decision, has imposed upon the parties the necessity of trying this case a third time regardless of the fact that it clearly appears from the evidence that respondents have no right of action for damages. The sole remedy of respondents (the one which they should have pursued) was the institution of proceedings before the Industrial Accident Board of the State of Texas for the recovery of workmen's compensation.*

Prayer.

Wherefore, petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 10772, Skelly Oil Company, Appellant, *vs.* Madie Ray Amacker, individually and as guardian of Barbara Ann Amacker, *et al.*, minors, Appellees," and that said judgment of the Circuit Court of Appeals for the Fifth Circuit may be reviewed by this Honorable Court and reversed and rendered in favor of petitioner and that your petitioner have such other and further relief

*Respondents have already recovered workmen's compensation from the insurance carrier of Gibbins & Heasley, Inc., and damages from Gibbins & Heasley, Inc., as a result of a compromise of their claims therefor (R. 407-408), involved in suits therefor (R. 401-404, 404-407).

in the premises as to this Honorable Court may seem meet and just.

SKELLY OIL COMPANY,
By W. P. Z. GERMAN,
ALVIN F. MOLONY,
Its Attorneys.

Of Counsel:
ED M. WHITAKER,
ROBERT M. TURPIN.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

The Opinion of the Court Below.

The majority opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is reported in 140 F. (2d) 21, and the dissenting opinion of Circuit Judge WALLER is reported in 140 F. (2d) 23. The opinion of the same court on the first appeal of this case is reported in 132 F. (2d) 431.

Jurisdiction.

The date of the judgment to be reviewed and other details justifying jurisdiction, are set forth at page 11 *ante* of the accompanying petition.

Statement of the Case.

The facts pertinent to the question presented are stated in the petition and in the interest of brevity are not repeated here.

Specification of Error.

The error which the petitioner will urge if the writ of *certiorari* is issued is as follows:

The Court of Appeals for the Fifth Circuit, which reversed the judgment of the District Court for the Western District of Texas and ordered a new trial (the third trial of this case), erred in not rendering a judgment in favor of petitioner.

ARGUMENT.

The Circuit Court of Appeals failed to give effect to the settled law of Texas as applied to the undisputed facts disclosed by this record, and therefore erred in remanding this case for another (the third) trial. Instead, it should have rendered judgment for petitioner.

The argument will be presented under three headings, namely, *(a)* The positions taken by the parties in their pleadings as to the legal relationship of Amacker and petitioner; *(b)* The undisputed facts; and *(c)* The settled law of Texas.

(a) *The positions taken by the parties in their pleadings as to the legl relationship of Amacker and petitioner:*

In the amended petition (R. 1-9) the respondents attempted to predicate their case upon the theory that Amacker was *an invitee* upon the premises of petitioner by alleging (R. 3) that Amacker "was an invitee" of the petitioner "due to the fact" that he was at the time working as an employee of Gibbins & Heasley, Inc., who in turn was performing work for petitioner in cleaning an oil stock tank of petitioner. However, in the same paragraph they also alleged that "the defendant Skelly Oil Company had full control and charge of said Elmer O'Neal Amacker," which allegation is but another way of stating, as the decisions of Texas hereinafter cited show, that petitioner had the right of control of Amacker and hence that Amacker was petitioner's employee. Subsequently, respondents three times alleged or referred to Amacker as petitioner's invitee (R. 4, 5). Petitioner in its amended answer (R. 9-13) expressly denied that Amacker was its invitee (R. 10), and pleaded

as its fifth defense (R. 11-12) that respondents were not entitled to recover for the reason that petitioner was a subscriber under the Workmen's Compensation Law of Texas.*

(b) *The undisputed facts:*

As stated on page 4 of the petition for *certiorari*, all the testimony of the witnesses in so far as it relates to the legal relationship between Amacker and petitioner is copied in Appendix "A," wherein citations to the record are made, attached to the petition and hereto. It there also appears which party introduced the various parts of said testimony.

This testimony shows that Gibbins & Heasley, Inc., had an oral understanding with petitioner that whenever petitioner requested both men and a foreman and tools, it would supply all three, but, when petitioner requested men only, then men only would be supplied (Redding, R. 99-103; Price, R. 25; Gibbins, R. 326). For sometime it had been furnishing "labor" to petitioner (Redding, R. 99-100). On the occasion in question, A. L. Rhodes, petitioner's district foreman (R. 93), called Ross Redding, Gibbins & Heasley's field superintendent (R. 99-100), and requested that he furnish men and told him the kind of work that was to be done (that is, tank cleaning); when Rhodes wanted a fore-

*As set forth on page 5 of the Petition for Writ of *Certiorari*, after the trial and verdict, petitioner, pursuant to the provisions of Rule 15(b) of the Rules of Civil Procedure for District Courts, and with leave of the District Court (R. 16), amended its amended answer to conform to the evidence by pleading its Eighth Defense (R. 14-15) wherein it alleged that according to the undisputed evidence Amacker was a special employee and working under the direction and control of petitioner in the performance of the work, and that petitioner was a subscriber under said compensation law and that because of said facts respondents were not entitled to any relief in the action. This amendment was allowed and filed before the District Court heard and acted on (R. 461-462) petitioner's motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial.

man with men he would ask for one and when he wanted tools he would call for labor and tools (R. 101-102); all he asked for this time was labor and labor only was supplied (Redding, R. 101, 103). Amacker and Clyde Pruitt were furnished the first day (see Rhodes, R. 181-182) and Amacker and Haymon V. Price (R. 29) the second day (Broam, R. 270-271). Gibbins & Heasley had no foreman on this work (Price, R. 25), no foreman in charge of the crew (Rhodes, R. 96); neither of the men furnished was designated as foreman (Redding, R. 103). Rhodes testified (R. 96) that "Gibbins & Heasley sent me a crew to work under me." Rhodes, as petitioner's lease foreman, was in charge of the work (Rhodes, R. 96, 190; Price, R. 21, 23). Rhodes transported Amacker to the lease on the first day, told him and Pruitt the kind of work that was to be done (R. 96), furnished the tools, "the Skelly Oil Company's tools," (R. 414) and worked with them in opening the first tank (Broam, R. 261-262); Rhodes said (R. 99) that no Skelly man worked with the crew, "Nobody except myself." Amacker and his coworker worked on an equal basis as common laborers in cleaning the tanks (see Rhodes, R. 181). Rhodes testified (R. 185) that at closing time on the first day, (after one tank had been cleaned and most of the sediment removed from the other tank) "we picked up our tools and then came in for the day." The next morning Rhodes transported Amacker and Price to the work (Price, R. 22), and, according to respondents' witness Price (R. 23), Rhodes told Amacker to put on his boots, go in the tank and proceed with the cleaning. In a few minutes Amacker came out of the tank, saying he felt weak, presently became unconscious, and Rhodes, Price and Broam (Price, R. 26-27) took him to a hospital where he died early the next day (Headlee, R. 305). It is

obvious the work in question was unskilled manual labor; it involved merely the physical labor of scraping out the sediment, about twelve inches on the bottom of each of the two steel tanks.

Petitioner proved, petitioner's Exhibits D-5 and D-6 (R. 196-220), that it was a subscriber under the Workmen's Compensation Act of Texas and carried compensation insurance for the protection of its employees. (Exhibit D-5 was offered in evidence at page 191, and D-6 at page 194, of the record.)

In rebuttal, respondents introduced some additional portions of the deposition of Rhodes (R. 413-415) which are copied in the Appendix, one feature of which is particularly discussed below. The other parts thereof serve to strengthen the evidence showing petitioner's supervision and control of the work.

In the Court of Appeals, respondents in their effort to escape the effect of the testimony copied in the Appendix (all of which was earnestly urged upon the Court of Appeals by petitioner), relied on one answer made by Rhodes (R. 413) when he was asked and said:

Q. "Did you attempt to exercise control over Mr. Amacker as to how his work was being performed?

A. No."

Judge WALLER in his dissenting opinion quoted this question and answer and certain other questions and answers of the witness Rhodes and said of them that when it is considered in the light most favorable to respondents, it is nothing more than a denial by Rhodes that he actually did direct and supervise the work of the deceased, but that his answers to other questions as to whether he did any-

thing *other than* supervise the work did not evoke evidence that he had no *right* of control and supervision and that it was insufficient to raise a question of fact as to the *right* to supervise and control. Thus, Judge WALLER recognized and gave effect to the rule that,

> "The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."
> —*Galloway* v. *United States,* 319 U. S. 372, 395, 87 L. ed. 1458, 1473 (cited on page 11 of the foregoing petition for writ of *certiorari).*

In addition to Judge WALLER's point, we submit that when the above copied testimony is considered in the light of all of Rhodes' other testimony, and the testimony of the other witnesses, it merely indicates that Rhodes did not undertake to exercise control of *immaterial details* of Amacker's work. The law in Texas is that the right of control need not extend to minute and immaterial details of the work. *Southern Surety Co.* v. *Shoemake,* (Civ. App.) 16 S. W. (2d) 950, 952, and cases there cited.

Besides, at most it would be but a scintilla of evidence touching the question of the exercise of supervision. But this Court has rejected the scintilla rule so far as the federal courts are concerned. *Pennsylvania Railroad Company* v. *Chamberlain,* 288 U. S. 333, 77 L. ed. 819. In that case this Court said:

> "And where the evidence is 'so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury.' (Citing cases.) The rule is settled for the Federal Courts, and for many of the state courts, that whenever in the trial of a civil case the evidence is clearly

such that if a verdict were rendered for one of the parties the other would be entitled to a new trial, it is the duty of the judge to direct the jury to find according to the view of the court. Such practice, this court has said, not only saves time and expense, but 'gives scientific certainty to the law in its application to the facts and promotes the ends of justice.' (Citing cases.) The scintilla rule has been definitely and repeatedly rejected so far as the Federal Courts are concerned. (Citing cases.)"

The testimony, in so far as it relates to the question under consideration, can be summed up no more accurately than was done by the Court of Appeals in its opinion on the first appeal of this case (written by Circuit Judge HUTCHESON, who did not sit on the second appeal), when therein (132 F. (2d) 431, second column on p. 432), the court said:

> "It was in testimony too that deceased had worked as a roustabout for many years in oil fields, that Gibbins & Heasley, Inc., his employer who *had sent him to the defendant* to do this job of cleaning out the tanks *was in the business of furnishing men* to oil companies for work as called for, and that it either sent them, *as it did this time, without a foreman and without tools,* or with a foreman and with tools, according to request. That on this occasion *it was merely called upon to send two men without a foreman and without tools,* that *the defendant was to direct when and how they were to do the work* and provide them with the necessary tools to do it."

Later on in said opinion (132 F. (2d), second column on p. 433) the court reiterated that interpretation of the testimony when it said, "*On this record the defendant had supervision and control over deceased,*" and was under a duty to

see that the dangerous work *"it put him to doing"* was done by reasonably safe and prudent means and methods, and that deceased in going into the tank to do the work required with the tools and equipment *"and in the way provided by the defendant"* had a right to assume that the defendant had taken adequate precautions, etc. That said court then, on the first appeal, deemed the evidence as to said legal relation to be undisputed is indicated, not only by the language we have quoted from its opinion, but, also, by the fact that the court did not say that that question should have been submitted to the jury. (That petitioner was a subscriber under the compensation law was not pleaded as a defense and not proved at the first trial and hence that fact did not appear from the record on the first appeal.)

We submit that the testimony in the present record, Appendix "A," demonstrates convincingly and beyond question that petitioner had *the right* of control and supervision, and actually exercised general charge and control, of the work, and that no one for Gibbins & Heasley had the right to or did exert any control or supervision whatsoever over it. We respectfully also submit that under these undisputed facts it was the duty of the Court of Appeals to reverse and render the case in favor of the petitioner. (See, *Pennsylvania Railroad Co.* v. *Chamberlain, supra.)*

(c) *The settled law of Texas:*

It is the settled law of Texas that:

(1) Where one person hires his servant to another for a particular employment, the servant, for anything done in that employment, becomes for the time being and as to that work the special servant of such other;

(1-a) The *right of control* of the servant by the new master is the determinative test of the legal relationship;

(2) Such servant is an employee of the person to whom he is so hired within the meaning of the Workmen's Compensation Law of Texas, whenever the one to whom he is so hired is a subscriber under said law; and

(3) If such employee is injured or his death results from an injury received by him while engaged in the course of his special employment, no action for damages may be maintained by him, or, in the case of his death, by his beneficiaries, but the exclusive remedy in such case is to recover compensation from the insurance carrier of the employee's special master by proceedings before the Industrial Accident Board of the State from whose final decision an appeal may be taken to the courts by either party.

—The Workmen's Compensation Act of Texas, Sec. 1 of Art. 8309, Vernon's Civil Statutes of the State of Texas, and Sec. 3 of Art. 8306 of said Act (which are quoted from on pages 7 and 8, *ante,* of the Petition for *Certiorari);*

Maryland Casualty Co. v. *Donnelly, et al.,* (Civ. App. Tex.) 50 S. W. (2d) 388 (wherein compensation was awarded to a special employee);

Independent Eastern Torpedo Co. v. *Herrington, et al.,* (Civ. App. Tex.) 59 S. W. (2d) 222;*

Western Casualty and Surety Co. v. *Muller,* (Civ. App. Tex.) 169 S. W. (2d) 223 (wherein workmen's compensation was awarded to a special employee);

Magnolia Petroleum Co. v. *Francis,* (Civ. App. Tex.) 169 S. W. (2d) 286;

Shannon, et al., v. *Western Indemnity Co., et al.,* (Com. App. Tex.) 257 S. W. 522;

*The Supreme Court of Texas, 95 S. W. (2d) 377, while reversing this case on another point, explicitly approved the holding of the Court of Appeals on the question here under discussion.

King v. *Galloway*, (Com. App. Tex.) 284 S. W. (2d) 942;

Southern Surety Co. v. *Shoemake*, (Civ. App. Tex.) 16 S. W. (2d) 950;

Liberty Mutual Ins. Co. v. *Boggs, et al.*, (Civ. App. Tex.) 66 S. W. (2d) 787.

See, also, *Judson & Little* v. *Tucker*, (Civ. App. Tex.) 156 S. W. 225 (a leading case on the borrowed servant rule).

See cases cited on page 8 of the petition for *certiorari* as to the exclusive original jurisdiction of the Industrial Accident Board of claims for compensation under the compensation act.

In *Maryland Casualty Co.* v. *Donnelly, et al., supra,* Maryland Casualty Company brought suit to set aside an award by the Industrial Accident Board of compensation to Donnelly and another, special employees of the insured. The verdict was favorable to defendants and the insurer appealed to the Court of Civil Appeals. Donnelly was a regular employee of one Busby who was engaged in the transfer business. Meriwether purchased a carload of steel to be used in the erection of a milk plant; he employed Busby to unload the steel and deliver it at the plant. When Busby with Donnelly arrived at the plant with a load of steel, Meriwether's foreman concluded to place the steel inside the building and said foreman instructed Busby, Donnelly and others how to get it into the building and gave them directions as to which portion to move first, etc. The court said, among other things:

> "Busby was paid $10 for moving the steel. Donnelly was not paid any wages directly by Meriwether. While, under the above state of facts, Donnelly was originally an employee of Busby and Busby was an in-

dependent contractor employed to unload the steel and move it to the south end of the building, it appears that after the steel arrived at the building, the foreman added another condition to the contract and required that the material be moved into the building and put in place where it was to be used, and that he assumed and exercised control and supervision over the men who were doing the work.

"*(2, 3)* There are many elements to be considered in determining whether one in performing a service is an employee or an independent contractor, but the most important element to be considered is whether or not the employer has the power or right to control and direct the servant in the material details as to how the work is to be performed. If the employer has the power to control the workmen in the manner in which the work is to be performed, the workman is an employee and not an independent contractor. *King* v. *Galloway*, (Tex. Com. App.) 284 S. W. 942; *Maryland Casualty Co.* v. *Kent*, (Tex. Com. App.) 3 S. W. (2d) 414; *Texas Employers' Ins. Ass'n* v. *Owen*, (Tex. Com. App.) 298 S. W. 542.

"The manner in which a person employed is to be compensated, standing alone, is seldom more than of minor importance. *Shannon* v. *Western Indemnity Co.*, (Tex. Com. App.) 257 S. W. (2d) 522, par. 4 (5).

"*(4)* The fact that one is casually employed for only a brief period does not mitigate against his right to the benefit of workman's compensation. *Oilmen's Reciprocal Ass'n* v. *Gilleland*, (Tex. Civ. App.) 285 S. W. 648; *Id.*, (Tex. Com. App.) 291 S. W. 197.

"*(5, 6)* Where one person lends his servant to another for a particular employment and such servant becomes subject to the direction and control of the person to whom he is lent, for anything done in that particular employment he must be dealt with as a servant of the person to whom he is lent, although he remains the

general servant of the person who lent him. *Judson & Little* v. *Tucker,* (Tex. Civ. App.) 156 S. W. 225 (writ ref.); *Fink* v. *Brown,* (Tex. Civ. App.) 183 S. W. 46, par. 1 and cases there cited.

"It will be seen that while Donnelly was in the regular employment of Busby, who it may be conceded was originally working as an independent contractor to move the steel to the south side of the building where it was to be unloaded, Meriwether's foreman, with Busby's consent, assumed control over Donnelly and the other employees of Busby not only in unloading the steel, but used them to perform extra services in connection with the erection of the building—the moving of the I-beam into the building and placing it in the position where it was to be used—and that while Donnelly was performing such service under the control and direction of the foreman, he was injured. Applying the test outlined in the cases above cited, it will be seen that Donnelly was an employee of Meriwether. There was ample evidence to support the verdict of the jury that he was such employee."

We believe that when this settled law of Texas is applied to the undisputed facts in this case, it becomes clear that the court of appeals erred in the respect stated in the specification of error.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of *certiorari* and thereafter reviewing and reversing said decision and rendering judgment in favor of petitioner.

Respectfully submitted,

W. P. Z. German,
Alvin F. Molony,
P. O. Box 1650,
Tulsa 2, Oklahoma,
Counsel for Petitioner.

Of Counsel:
Ed M. Whitaker,
Robert M. Turpin,
Midland, Texas.

Appendix "A."

The following is all the testimony there is concerning the legal relationship between the deceased Amacker and the petitioner, Skelly Oil Company. Said company is sometimes referred to below by its name and sometimes as defendant. Respondents are referred to as plaintiffs.

This testimony concerns, *(a)* the terms, express and implied, of the contract, which was oral, between the defendant Skelly Oil Company, owner of the tanks, and Gibbins & Heasley, Inc., the general employer of Amacker and his coworker Pruitt on the first day and his coworker Price on the second day; also the testimony which shows *(b)* who actually directed and supervised the work and workmen; *(c)* who had the responsibility for attaining the ultimate result of the work; *(d)* who furnished the tools; *(e)* who was recognized by the workmen as the master; and *(f)* the nature of the work, that is whether manual only or involving special skill.

We have endeavored to make an orderly arrangement of what we copy regardless of the order in which it was introduced.

J. P. GIBBINS, a witness for defendant, testified that his company, Gibbins & Heasley, Inc., headquarters at Midland, Texas, is and has been since 1935 in the oil well servicing contractor business (R. 315), has worked for many oil companies in the West Texas oil fields (R. 326-327), and has worked for Skelly Oil Company since 1935 (R. 325).

On cross examination by Mr. Watts, one of plaintiffs' attorneys, he testified in part (R. 325-326):

Q. "Was your work performed under written contract with Skelly Oil Company?

A. I don't believe so.

Q. There have been some individual contracts that you have had with them on different pieces of work?

A. Well, I don't remember. We might have had some, laying pipeline or something like that.

Q. But you never had any contract with them with reference to the work you performed cleaning out tanks?

A. All we would have on that would be our verbal agreement.

Q. That was hourly work, wasn't it?

A. Hourly work.

Q. You did not furnish any equipment on this job, did you, that Mr. Amacker was injured on?

Mr. Whitaker: Provided the witness knows. I don't think the witness had anything to do with this particular transaction at all.

The Court: Of course, he will not testify to something he does not know perhaps. Overrule the exception to the question.

A. Well, I don't know on this particlar job. If they call us for any tools we furnish them; if they don't we would not.

Q. When they ask for tools you send them, and when they don't you just send men?

A. That is right. If they ask for men we will send men, whatever they want."

ROSS REDDING, a witness for plaintiffs, testified by deposition in part as follows:

Questions by Mr. Watts (R. 99-103).

Q. "By whom are you employed?

A. Gibbins & Heasley, Incorporated.

Q. What duties do you perform for Gibbins & Heasley?

A. I am field superintendent.

* * * * * * * *

Q. For what purpose did you hire Mr. Amacker?

A. Roustabouting, which is general oil field work.

* * * * * * * *

Q. Did you have any conversation with anyone representing the Skelly Oil Company in connection with furnishing them any employees for any purpose on or about July 20th, or prior thereto, 1940?

A. Nothing other than the regular labor we had been furnishing.

* * * * * * * *

Q. Under what circumstances had you been furnishing Skelly Oil Company labor?

A. Mr. Rhodes† would phone in of a morning and tell me how many men he wanted and I would send them to him.

Q. Did he tell you what job he wanted them on?

A. Yes.

Q. And you had been doing that since March of 1940?

A. To my knowledge, yes.

Q. Is that all he would tell you, that he wanted so many men?

A. And the kind of labor there was to do.

Q. Was there a written contract between Gibbins & Heasley and the Skelly Oil Company with reference to getting the men?

A. None to my knowledge.

Q. Did you ever send anything besides the men?

A. Often we would furnish a pick-up and tools.

Q. Often you would?

A. Yes.

Q. On what kind of jobs?

A. General roustabout work. Sometimes in connection with tank cleaning or anything that might be doing.

Q. When you furnished the tools would you or not send a foreman?

A. Yes.

Q. Did Mr. Rhodes advise you when he would want a foreman and when he wouldn't want one?

---

†Defendant's district foreman. (R. 93)

A. Yes.
Q. He would?
A. Yes.

* * * * * * * *

Q. Was labor all he called for?
A. Yes.
Q. When he wanted tools would he call for labor and tools?
A. That's right.
Q. On this clean-up job for the Skelly that Mr. Amacker was injured on? You furnished no tools?
A. I furnished no tools.
Q. Why didn't you?
A. I wasn't asked for any.
Q. The main reason you didn't was because Mr. Rhodes didn't ask for any tools?
A. Mr. Rhodes didn't ask for any. I had a gas mask available if my men asked for it.
Q. You testified a while ago that Mr. Rhodes, when he wanted them, he would ask for them as well as labor?
A. That's right.
Q. The only thing he requested when he told you to get Mr. Amacker was labor?
A. Yes.
Q. Did Mr. Rhodes tell you he was going to be there and supervise the operation of cleaning out the tank?
A. No, he didn't state that.
Q. Did you send any foreman along with this crew?
A. I had—neither of the men were designated as foreman."

A. L. RHODES, district foreman for Skelly Oil Company (R. 93), testified by deposition taken and introduced by plaintiffs, in part as follows:

Questions by Mr. Watts (R. 96-99).

Q. "What connection did you have with Elmer O'Neal Amacker?

A. Not any with the exception that he rode up with me the day prior to his accident, his illness, and the date of his illness. I did not hire him. I presume Gibbins & Heasley did; he was on their payroll. Gibbins & Heasley sent me a crew to work under me.

Q. Who gave the orders on the job?

A. I told the men the kind of work that was to be done and as far as being with them continually, I wasn't with them continually, all of the time.

Q. Was there a Gibbins & Heasley company foreman in charge of the crew?

A. No.

Q. Who was in charge of the Gibbins & Heasley crew?

A. The men did the work where there was just one or two in the crew and I was there with them while the work was being done, part of the time.

Q. What was the first thing that brought to your mind that Mr. Amacker had become ill, as you say?

A. He was working in a tank adjoining the one that I was working in. Mr. Broom, Clyde Broom, came to the tank where I was working and said, 'Something is wrong with one of the men.' So I came out and noticed that Mr. Amacker was acting like he was sick. He was standing up by the side of the tank. I asked him how he felt. He said his legs were weak, that he felt weak.

Q. What did Mr. Broom tell you when he came to you?

A. He came and said there was something wrong with one of the men.

* * * * * * * *

Q. Did you provide them with any tools by which the

tank could be cleaned from the *outside?* (Emphasis supplied.) (Note)

A. No, sir.

* * * * * * * *

Q. How many were in the crew that Mr. Amacker was working with?

A. Two.

Q. How many men were working with the crew under you for the Skelly?

A On the job?

Q. Yes?

A. Two men was all that was doing work at that time, with the exception of myself. I did work on another job.

Q. Mr. Amacker was working for Gibbins & Heasley, wasn't he?

A. Yes, sir.

Q. Did you have any men in your crew who were working for Skelly?

A. No, sir.

Q. None at all?

A. Nobody except myself."

Questions by Mr. Turpin, one of defendant's counsel (R. 179-182).

Q. "What did the job consist of, Mr. Rhodes?

A. The kind of work?

Q. Yes.

A. Taking off the dome plate, the center dome plate, and taking the manhole plate, and taking one sheet off of the top of the tank, and connecting up the pump and raking out the sediment, the tank sediment.

Q. How many tanks were there to clean out on that lease?

A. We were to clean out two.

NOTE: The cleaning in question was done from inside the tanks.

[APPENDIX]

Q. Did you say that this job started on the 18th of July, 1940?

A. The 18th or 19th of July, 1940.

Q. Mr. Amacker worked from the beginning of the job?

A. Yes, sir.

Q. The tank that Mr. Watts has been questioning you about, was that the first or second tank that was cleaned out?

A. The second tank.

Q. Second? Had Mr. Amacker worked on cleaning out another tank on this lease?

A. Yes, sir.

Q. Where was it located?

A. The adjoining tank to where he became injured, at the time that he became injured.

Q. How was the first tank cleaned out?

A. In the same manner, with a paddle, pulling the tank bottom sediments to the transfer pump.

Q. On that first tank in what way was the tank opened?

A. The manhole plate had been taken off, the center dome plate had been taken off, and a sheet of the tank had been raised with a board, to get circulation through the tank.

Q. Did Mr. Amacker work on doing that job?

A. Yes.

Q. How was the second tank, which is the tank that Mr. Watts has heretofore asked you about, opened?

A. In the same manner exactly as the first tank was that we cleaned.

Q. Did Mr. Amacker work on the first job, the first tank?

A. Yes.

Q. Did he have a gas mask when he went in the first time?

A. He didn't.

Q. What work did he do on the first tank?

A. He went into the tank and paddled the bottom sediments, or B. S. or murk to the front of the tank where the transfer pump picked it up.

* * * * * * * *

Q. During that four hours it took to clean out the first tank, was Mr. Amacker in and out of the tank during all of that time?

A. He was.

Q. Was Mr. Pruitt in and out of the first tank during all of that period?

A. He was.

Q. Did Mr. Amacker and Mr. Pruitt ever both go into the tank at the same time?

A. No, sir.

Q. When was the cleaning out of the first tank completed, about what time of day?

A. About three o'clock.

Q. When that was done what did Mr. Amacker and Mr. Pruitt do?

A. We had in the meantime partly taken off the manhole plate on the adjoining tank, the second tank, and we started to cleaning it after the first tank was finished."

Q. (R. 184-185:) "You would say eight or ten minutes was the usual interval that he stayed in the tank?

A. Yes, that was—they used their own judgment about how long they would stay in the tank and that is about the length of time they would stay in. Eight or ten minutes.

* * * * * * * *

Q. On the first day you worked on that second tank, did you ever tell Mr. Amacker to go into the tank?

A. I did not.

Q. On the second day you worked on that tank did you ever instruct Mr. Amacker to go into the tank?

A. I did not.

Q. Did you ever instruct, on that first day, Mr. Pruitt to go into the tank?

A. I did not.

Q. On the second day did you ever instruct Mr. Price to go into the tank?

A. No.

Q. I believe you testified that you quit work that first day about four-fifty?

A. I did.

Q. What did you do then?

A. We picked up our tools and then came in for the day.

Q. Did you leave that second tank open?

A. We did."

Q. (R. 187:) "Did Mr. Amacker work in the work of cleaning out this eight or ten inches?

A. Yes.

Q. And that was done, all of that was done on the first day of cleaning?

A. The first ten and a half inches had been removed the first day we worked at cleaning the tank.

Q. And it had been removed by 4:50 p. m. of the afternoon of the first day's operations? Is that correct?

A. It is.

Q. And at about after 10 a. m. of the next day Mr. Amacker went back into the tank to clean out the last two inches?

A. He did.

Q. Had the tank been open during all of that time, between the ceasing of operations the day before, and the beginning on that morning?

A. It had been.

Q. How long was Mr. Amacker in that tank the morning of the second day?

A. I judge some three or four minutes.

Q. Did you take Mr. Amacker to the lease that morning?

A. I did."

Q. (R. 189:) "At one-thirty p. m., when they finished cleaning the first tank, how long had that first tank been opened?

A. We taken the manhole plate off, the center dome plate and one sheet of the top and started cleaning the tank immediately."

Q. (R. 190:) "Were you in charge for the Skelly Oil Company out there?

A. Yes.

Q. Do you have the power to discharge employees for the Skelly Oil Company?

A. Yes, sir.

Q. Do you have the power to hire employees for the Skelly Oil Company?

A. I don't.

Q. Who hires them?

A. Mr. Hunt.

Q. Where is he located?

A. At Monahans.

Q. And did Mr. Hunt have any supervision or anything to do with Mr. Amacker or any of the crew that was working with Mr. Amacker for Gibbins & Heasley, at the time that Mr. Amacker became ill?

A. He did not.

Q. You were the sole representative at that time, or not, for the Skelly Oil Company?

A. Yes, I was."

Plaintiffs introduced in rebuttal the following portions of the deposition of said witness A. L. RHODES:

Q. (R. 413:) "Did you do anything other than supervise the work that was being done?

A. No.

* * * * * * * *

Q. Did you attempt to exercise control over Mr. Amacker as to how his work was being performed?

A. No." (Note)

Q. (R. 414-415:) "Who furnished the equipment on the job on which the tank was to be cleaned out?

A. I taken my tools, or the Skelly Oil Company's tools.

Q. What kind of equipment did you furnish Mr. Amacker?

A. I furnished him with a transfer pump and the wrenches that are necessary to do the work.

* * * * * * * *

Q. Did anyone other than you, representing the Skelly Oil Company have anything to do with this work that Mr. Amacker and his crew were doing?

A. No, sir.

Q. Were you in charge for the Skelly Oil Company out there?

A. Yes.

* * * * * * * *

Q. You were the sole representative at that time or not, for the Skelly Oil Company?

A. Yes, I was."

CLYDE BROAM, a witness for defendant, was, at the time of the second trial, employed by Stanolind Oil & Gas Company as a pumper and switcher on its Ford lease adjoining Skelly's Ford lease, and was doing like work on Skelly's lease. In July, 1940, the time involved in this suit, the Stanolind Ford lease belonged to the Barnsdall Company and Broam was then employed by the Barnsdall, and, under a like arrangement he was then also working on the

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NOTE: This answer of Mr. Rhodes, when considered in the light of his other testimony, shows merely that he did not exercise control over the immaterial details of Amacker's work. See, *Southern Surety Co.* v. *Shoemake*, (Civ. App. Tex.) 16 S. W. (2d) 950, first column of page 952, and cases there cited. See, also, the remarks of Judge WALLER concerning this testimony in his dissenting opinion at top of page 495 of the Record. (140 F. (2d) 21, 23.)

Skelly Ford lease. (See R. 258-259 and 276.) He testified in part as follows:

Examination by Mr. Whitaker, one of defendant's counsel.

Q. (R. 261-262:) "Do you know how the tank was opened, when the tank was opened that morning, for the men to go in and clean?
A. The first morning?
Q. Yes, sir.
A. Yes, sir.
Q. Who did that?
A. Mr. Rhodes and Clyde Pruitt and Mr. Amacker."
Q. (R. 266:) "Was the second tank now the one on the extreme left,—which was the second tank cleaned?
A. This one here (indicating).†
Q. Was that opened that day or next day?
A. Opened that day.
Q. What time of day?
A. Right after lunch.
Q. Who did it?
A. Mr. Amacher and myself.
Q. How did you open it?
A. The same way as we had the first one."
Q. (R. 270-271:) "Were you there at any time next day?
A. Yes, sir.
Q. When?
A. Next morning about 10 o'clock.
Q. Did Mr. Amacker come back?
A. Yes, sir.

* * * * * * * *

Q. Who came back with him?
A. Mr. Price and Mr. Rhodes.
Q. Mr. Rhodes, Mr. Amacker and Mr. Price?

†A plat is here referred to by the witness, possibly the one at R. 393, tank No. 57395. (See R. 271)

A. That is right."

Q. (R. 278:) "Suppose you are going to clean out a tank, not for the purpose of treating or painting it but just to relieve the B. S. so that it won't interfere with the flow of the oil into the pipeline, then is it customary to go in the tanks, or is that done without going in?

A. Just average you can do it without going in.

Q. Do you know why these tanks were being cleaned?

A. They were going to paint them with tar on the inside."

HAYMON V. PRICE, employed for a number of years by Gibbins & Heasley, Inc., testified by deposition, as plaintiff's first witness. (R. 20) He and Amacker were the men who were furnished by Gibbins & Heasley the second day, July 20, 1940; Price was in lieu of Pruitt who had worked with Amacker the first day, July 19. He testified in part as follows:

Questions by Mr. Watts:

Q. (R. 21-23:) "Who was working on the job with you and Mr. Elmer O'Neal Amacker, if you remember?

A. Handling tools?

Q. Who all was there, if you remember?

A. Mr. Rhodes.

Q. Who was Mr. Rhodes?

A. He was, why I guess he was rated as farm boss, isn't he?

Q. Who for?

A. For the Skelly.

Q. Now who carried you to work on or about July 20th, 1940?

A. Mr. Rhodes.

Q. Who did you ride to work with?

A. Mr. Rhodes and Mr. Amacker.

* * * * * * * *

Q. Did you have any discussion with him (Amacker)

at any time with reference to going into the tank at the time that he was getting ready to go into the tank?

A. Well, yes. The only question along that line, he beat me to the boots and I asked, he was putting the boots on, and I asked him if he would rather I would go in first, and——

Q. What did he say?

A. He said no, he had them partly on and he would go on in.

* * * * * * * *

Q. What were you fellows doing to this tank?

A. Cleaning the B. S. out.

Q. What is B. S.?

A. It is settlement from oil.

Q. Is this the same Mr. Rhodes that you referred to awhile ago?

A. Yes, he worked for Skelly.

Q. What did he tell him, that is, Mr. Rhodes?

A. He told him to get his boots and go in the tank and get to cleaning it out."

Q. (R. 25-26:) "Had you performed other work for Gibbins & Heasley?

A. Yes.

Q. On other jobs had—what was your custom with reference to Gibbins & Heasley furnishing you tools?

A. Other companies furnishing them?

Q. I mean on other jobs did Gibbins & Heasley furnish the tools on other jobs, or not?

A. They did on other jobs where they paid for them.

Q. Yes?

A. But they didn't ask for that. The job was did through roustabout scale and where Gibbins & Heasley sent a man on a job, a foreman on the job, why they furnished the tools.

Q. Yes?

A. But Gibbins & Heasley didn't have any foreman on the job.

Q. And did Gibbins & Heasley furnish any tools on this occasion, on the occasion that Mr. Amacker was injured?

A. No.

Q. Was there any gas mask there that you saw?

A. No.

Q. There was nothing out there but the tank and the boots?

A. That's right, and the paddle to roll it out with."

Q. (R. 27:) "Yes? What happened then?

A. I laid him down there and just about the time that I got him there this pumper† walked by.

Q. Then what did you all do?

A. Well, the pumper, I told him to tell Rhodes to get there. He was around on the other end of the battery and he came on around there and so we began working his arms and it seemed like life was leaving him."

Q. (R. 29:) "Now who was it that told you to go out on the job with Rhodes?

A. Ross Redding. He was field superintendent. He was field superintendent for Gibbins & Heasley.

* * * * * * * *

Q. Now on these—had you ever had to go by the warehouse to get tools while working for Gibbins & Heasley?

A. Yes, when we went on jobs when we used their equipment.

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Q. You were not given any instructions to go by that day and get tools?

A. No."

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†Evidently he refers to Clyde Broam.